GANDA OIL INDUSTRIES SDN. BHD. & ORS. v. KUALA LUMPUR COMMODITY EXCHANGE & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.)
February 23 & September 12, 1987]

[Kuala Lumpur — Supreme Court Civil Appeal No. 266 of 1985]

Administrative Law – Certiorari – Whether act of Kuala Lumpur Commodity Exchange amenable to judicial review – Commodities Trading Act 1980.

The appellants in this case applied for an order of certiorari to quash the decision of the Kuala Lumpur Commodity Exchange fixing the price of crude palm oil at $1,350/- per metric ton in respect of 617 lots purchased by the appellants on the floor of the Exchange. The grounds given were excess of jurisdiction and bad faith. The learned trial judge dismissed the application and the appellants appealed.

Held: (1) in this case, the ministerial control is only in respect of policy matters and not the day-to-day administration and business of the Exchange. The relationship between the parties who are members of the Exchange is clearly contractual and the exercise of the power of the KLCE in this case under regulation 11 of the General Regulations is also an exercise of a power derived under the contract. The act which is the subject of the challenge is, by its nature, not and should not be made amenable to judicial review;

(2) because of the conclusion on the basic issue, it would not be proper for the court to deal with or form any opinion on the arguments on the two grounds raised by the appellants.

Cases referred to:

(1) *Reg.* v. *Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864.
(2) *O.S.K. & Partners Sdn.* v. *Tengku Noone Aziz & Anor.* [1983] 1 M.L.J. 179.
(3) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 205.
(4) *O'Reilly* v. *Mackman* [1983] 2 A.C. 237.
(5) *Re Application by Loke Wan Tho* [1956] M.L.J. 149.
(6) *R.* v. *East Berkshire Health Authority, ex parte Walsh* [1984] 3 W.L.R. 818.
(7) *Council of Civil Service Unions* v. *Minister for the Civil Service (GCHQ* case) [1985] A.C. 374.
(8) *Reg.* v. *Panel on Take-Overs and Mergers, Ex parte Datafin p.l.c. & Anor.* [1987] 1 All E.R. 564.
(9) *R.* v. *Board of Visitors of Hull Prison* [1978] Q.B.D. 678.
(10) *New Zealand Stock Exchange* v. *Listed Companies Association* [1984] 1 N.Z.L.R. 699.
(11) *Reg.* v. *National Coal Board, Ex parte National Union of Mineworkers & Ors.* [1986] I.C.R. 791.

SUPREME COURT.

Raja Abdul Aziz Addruse for the appellants.
Haji Sulaiman Abdullah for the 1st respondent.
Porres P. Royan for the 2nd respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the judgment of the court): Just before the close of trading on February 28, 1984, one Matthes & Porton (M) Sdn. Bhd. (M & P), a member of the Kuala Lumpur Commodities Clearing House (KLCCH) and also a member of the Kuala Lumpur Commodity Exchange (KLCE), purported to sell 761 March 1984 CPO Futures Contracts on the floor of the KLCE on behalf of one Sun Edible Oil Industries (M) Sdn. Bhd. (Sun Edible Oil) which was also a member of both KLCCH and also KLCE. On the morning of February 29, 1984, Sun Edible Oil notified KLCCH by telex that they denied and rejected the said trades. Whereupon KLCCH contacted M & P to inform them that in view of the non-acceptance of the trades they would be required to pay the deposits in respect of the said contracts amounting to $7,610,000/-. But the deposits were not forthcoming and KLCCH decided not to register the said contracts. The decision was communicated to all affected members. After receiving various representations including representations from the relevant government agencies and other members of the palm oil industries, KLCCH agreed to register the said contracts to protect and maintain the market and to restore confidence in the industry. The said contracts were registered on March 12, 1984 but again M & P refused to pay the required deposits. As a result of the default, KLCCH decided to liquidate all the said contracts at the price to be fixed by the Exchange Board. On March 16, 1984, KLCCH was advised by KLCE that the price of the said contracts for the purpose of invoicing by way of compulsory settlement had been fixed at $1,350/- per tonne.

The KLCE is a company limited by guarantee which has been approved by the Minister to be a commodity exchange under the Commodities Trading Act 1980. The KLCCH is also a private company formed pursuant to the Act which acts as a clearing house of the Malaysian Crude Palm Oil Futures Market established and operated by the KLCE. Every member of the KLCE shall sign an agreement and shall agree to be bound by all the articles of the exchange company and all rules and regulations thereunder. A member of

the KLCE company placing business in a futures contract of the Exchange directly on the floor or indirectly through a floor member shall require such contract to be registered with the KLCCH in the name of the client. Any private company admitted as a member is bound by the General Regulations for Futures Delivery Business of the KLCCH.

The appellants are private limited companies carrying on business, *inter alia*, of palm oil processing and refining or palm oil producing, having their respective registered offices in various parts of the country. All the appellants, save the 2nd, 4th, 6th and 10th, were at all material times members of the KLCE and the KLCCH.

The appellants went before the High Court to ask for an order of certiorari to quash the decision of the KLCE made on March 15, 1984 fixing the price of crude palm oil at $1,350/- per metric ton in respect of 617 lots purchased by the appellants on the floor of the KLCE. The two grounds given in the statement were excess of jurisdiction and bad faith. The appellants alleged that the KLCE had invoked rule 300 of its Emergency Rules recognising the existence of a state of emergency but, however, failed to act under rule 300(f) of the Emergency Rules to fix the price thereby denying the appellants compensation receivable under that rule. The appellants also alleged that the KLCE had itself on 14 & 15, March 1984 fixed the price at $1,520/- per metric ton in respect of other contracts but nonetheless fixed a lower price for the lots purchased by the appellants.

It was argued on behalf of the respondents, however, that the operative words in rule 300(2) are "take such one or more steps as it sees fit and proper" and the words "without prejudice to the generality of this rule". It was also their argument that rule 300 under the Emergency Rules does not divest the KLCE of its powers to invoke regulation 11 of the General Regulations. As regards the second ground, it was argued by the respondents that regulation 11 gives a wide discretion to the KLCE to fix a settlement price and what was done in fact as to fix the price as at February 28, being the actual trading date and in the price fixed, the compensation element was already included.

The learned judge dismissed the application with costs but since there is no written judgment we are unable to say on which of the issues the learned judge decided to determine the application before him.

It was urged upon us that the crucial question to be determined is whether the KLCE is a public body whose decisions are subject to judicial review. We think that it is too broad a question for the purpose of this appeal. It may be observed, however, that the KLCE is a body established under a statute, that is, the Commodities Trading Act 1980. We also observe that the powers of the Minister under the Act are confined mainly to policy matters and not the day to day running and administration of the KLCE. One of the roles of the Minister is to ensure that before he approves the establishment of an exchange, he must be satisfied that certain requirements are fulfilled and one of these requirements is that the constitution of the exchange must provide that no rules of the exchange shall be effective unless first approved by the Minister in writing (section 10(3)(e)). It is at best an indirect control in the running of the affairs of the exchange.

The actual management of the exchange is vested in the Management Board consisting of not less than three and not more than five members to represent each commodity who shall be elected from amongst members of the exchange company by the members (section 12(2)). They also hold office for such period as members of the exchange company may determine (section 12(3)).

Other powers of the Minister relate to types of commodities for trading in commodity futures contracts (section 13). Sections 14 and 15 of the Act relate to the powers of the Minister on suspension and revocation of approval for non-compliance of the requirements of the constitution referred to earlier. Section 16 relates to the closure of the exchange in an emergency. Sections 53 and 54 deal with the power of the Minister by regulations to fix limits of trading by persons. Section 60 deals with the powers of the Minister to appoint a Commodities Trading Tribunal to enquire into allegations of misconduct of the exchange and Management Board of the Clearing House. The Minister also has a role in sections 81 and 82 of the Act relating to the claims for compensation from the Compensation Fund established under the Act.

There is also indirect control of the Minister through the Commissioner of Commodities Trading, who is an officer appointed by the

Minister to carry out the policy decisions of the Commodities Trading Council which is an advisory body to the Minister established under section 3 of the Act.

A similar question was raised in *Regina* v. *Criminal Injuries Compensation Board, ex parte Lain* [1] where the widow of a police officer who died as a result of injuries sustained applied to the Compensation Board for compensation for herself and her three children but was dissatisfied with the amount awarded because of certain deductions made. The Board contended, *inter alia,* that certiorari did not lie since it was not a body of persons amenable to the supervisory jurisdiction of the court in that it did not have legal authority in the sense of statutory authority, nor did it have authority to determine questions affecting the rights of subjects. The Court of Appeal held that the Board was amenable to supervisory jurisdiction. The public element is clearly there in that the compensation scheme was promulgated under prerogative powers for the purpose of compensating victims of crimes of violence by way of *ex gratia* payments out of funds provided through a grant-in-aid. It is obvious that the Board in *Ex parte Lain* was not purely of a private or domestic character but a body of persons having power to determine matters affecting subjects and therefore had a duty to act judicially.

In *O.S.K. & Partners Sdn. v. Tengku Noone Aziz & Anor.*[2], the court was also asked whether the Kuala Lumpur Stock Exchange is a body in respect of which an order of certiorari could issue. The High Court held that it was not but the Federal Court held it was. The High Court held that the Exchange was essentially a private body and the relationship between the parties was contractual in nature. What happened in that case was that the applicant had come to the court seeking to quash the decision of the Kuala Lumpur Stock Exchange Committee which had imposed on the applicant a fine of $15,000/- for alleged breaches of certain rules of the Exchange. The applicant was a member of the Exchange. According to the rules of the Exchange relating to member firms and member companies, every member shall undertake to observe the rules in consideration for approval of trading on the Exchange and the use of the Exchange trading facilities. One of the articles of the Memorandum of the Association of the Exchange provided for suspension, expulsion or other disciplinary action against a member.

In determining how far the arms of certiorari be allowed to go, we have the classical pronouncement of Atkin L.J. in *R.* v. *Electricity Commissioners*[3] that "wherever any body of persons *having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially*, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division." (emphasis provided)

In *O'Reilly* v. *Mackman*[4] Lord Diplock stressed that the 1977 amendment to Order 53 of the English Rules removed only the procedural disadvantages for those seeking to challenge the "lawfulness of a determination of a statutory tribunal or any other body of persons having legal authority to determine questions affecting the common law or statutory rights or obligation of other persons or individuals". The rights whose protection is available by judicial review are rights protected by public law.

In *Re Application by Loke Wan Tho*[5] (where the court was asked whether an order of certiorari would lie to the City Council of Singapore), the view of Whyatt C.J. that certiorari would not lie to bodies other than courts *stricto sensu,* unless their jurisdiction is regulated by analogy to judicial rules, can now be regarded as too narrow.

Sir John Donaldson M.R. puts it broadly in *R.* v. *East Berkshire Health Authority, ex parte Walsh*[6] that the remedy of judicial review is only available where an issue of public law is involved. But he said the expressions "public law" and "private law" are recent immigrants and must be used with caution. There must be "public law" obligation before certiorari is available and not merely a breach of a "private law" obligation. Normally, it is the existence of statutory provisions which inject the element of public law to attract remedies of certiorari.

A comprehensive survey and analysis of decisions which are susceptible to judicial review can be found in the landmark decision of the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service* (*GCHQ* case).[7] In the speech of Lord Diplock, he said at p. 409:

"For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which

have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself ..."

The House of Lords was dealing with the exercise of a prerogative (the issuing of instructions to the Civil Service) and where there were also national security considerations.

In *Regina* v. *Panel on Take-overs and Mergers, ex parte. Datafin plc & Anor.*,[8] the question whether the action of the Panel on Take-overs and Mergers was subject to judicial review was answered by the Court of Appeal in the affirmative unanimously (Sir John Donaldson M.R., Lloyd and Nicholls L.JJ.) because of "the special nature" of the panel. Relying on the speech of Lord Diplock in the *GCHQ* case, counsel for the Panel had argued that (i) the sole test whether the body of persons is subject to judicial review is the source of its power, and (ii) there has been no case where that source has been other than legislation, including subordinate legislation, or the prerogative. Lloyd L.J. disagreed and said at p. 583:

"I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *R.* v. *Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 All E.R. 327, [1953] 1 Q.B. 704]."

In between these two extremes, there is an area in which it would be useful to look not just at the source of power but at the nature of the power. Thus if the body in question is exercising public law functions or if the exercise of its functions has public law consequences, then that would certainly be sufficient to bring the body within the reach of judicial review but not otherwise.

A useful general guideline by Widgery C.J. in *R.* v. *Board of Visitors of Hull Prison*[9] may perhaps be adverted to where he said:

"One must start this question of whether certiorari will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari. If we ever get to the day when one turns up a book to see what the limit of the rights of certiorari is it will mean that the right has become rigid, and that would be a great pity. Therefore, we approach it today, in my judgment, on the basis that there are no firm boundaries, and one has to look to such clear and useful, helpful pointers as, with the assistance of counsel, we have been able to derive from the authorities."

In *New Zealand Stock Exchange* v. *Listed Companies Association*,[10] the Court of Appeal examined the relationship between the New Zealand Stock Exchange and a listed company. The functions of the New Zealand Stock Exchange are, *inter alia*, to operate a national stock exchange. The 1981 amendment Act also provided that the Exchange shall make rules for the conduct of its members and for the conduct of the business of the Exchange. All such rules made by the Exchange or any amendments thereto shall not come into force until they are approved by the Governor-General in Council and published in the Gazette. This provision is similar to section 10(3)(e) of our Commodities Trading Act 1980. It was argued in the *N.Z. Stock Exchange* case that the Exchange had public law responsibilities to avoid acting arbitrarily in relation to exercising its rights to cancel, suspend or delist a member. The court was asked to consider that the action of the Exchange to suspend, cancel or delist might be made the subject of judicial review. The Court of Appeal answered simply that whatever may be the position concerning the actual exercise of a statutory power to contract, Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute could have all its commercial operations subject to constant judicial review. It was held that the relationship between the Exchange and the listed company is contractual and the right to suspend listing is one which is conferred by and exercised under the contract between the Stock Exchange and the company. The Stock Exchange is entitled as a matter of contract to enforce its listing requirements in respect of the companies wishing official listing, to vary those listing requirements from time to time and to enforce the variations after due notification to listed companies. Any delisting decision will have to be communicated to and honoured by members of the Exchange. The rationale of the conclusion of the New Zealand Court of Appeal is contained in its judgment at p. 707:

"In the case of the Exchange there are two matters which raise quite different considerations and need to be considered separately. The first can be mentioned very shortly.

It turns upon the character of the act involved when the Exchange enters into a listing contract. It may not follow by any means that such a step in itself amounts to the exercise of a statutory power even though most clearly it is the exercise of a statutory function.

The second point concerns the exercise by the Exchange of the power of suspension. That was, it was said, the exercise of a right given by the contract and thus was clearly outside the scope of the exercise of any power under the statute; at best it could be described as one step removed from the exercise of a statutory power; and it is only that latter action which is the subject of challenge in these proceedings."

In *Regina* v. *National Coal Board, ex parte National Union of Mineworkers and Others,*(11) representatives of four unions involved in the mining of coal sought judicial review of the National Coal Board's decision to close a colliery. It was argued on behalf of the Board that that was not a case amenable to judicial review since it did not involve public law. What Macpherson J. said at p. 795 is instructive. He said that whilst the Board may have duties and powers given by statute and is for some purpose regarded as a public body it is not in any way empowered by statute to make a decision which is subject of the attack nor was the decision in any way part of its activities as a public body which can be reviewed. Macpherson J. then continued:

"Of course it has public interest. Of course it deals with public money. Of course it concerns the unions and their members. But it is not, in my judgment, a decision in the field of public law ...".

In the instant case, ministerial control is only in respect of policy matters and not the day to day administration and business of the Exchange. The relationship between the parties who are members of the Exchange is clearly contractual and the exercise of the power of the KLCE under regulation 11 of the General Regulations is also an exercise of a power derived under the contract. The act which is the subject of the challenge is, by its nature, not and should not in our view be made amenable to judicial review.

Because of our conclusion on the basic issue, we do not think it would be proper for us to deal with or form any conclusion on the arguments on the two grounds raised by the appellants.

The appeal is accordingly dismissed with costs. Deposit to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Zain & Co.; Shook Lin & Bok.*

PERMODALAN MBF SDN. BHD. v. TAN SRI DATUK SERI HAMZAH BIN ABU SAMAH & ORS.

[S.C (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) July 17 & November 2, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 497 of 1986]

Civil Procedure – Injunction – Ex parte injunction – Application to set aside – Whether injunction can be suspended – R.H.C. 1980 O.29 r.1, O.32 r.6 & O.92 r. 4.

The appellants had on November 20, 1986 obtained an *ex parte* interim injunction before Zakaria Yatim J. to restrain the 11th respondent, Emtex Corporation Berhad, and its directors, the 1st to 8th respondents, from functioning or performing any of the duties of directors or officers of the company and to refrain from completing and proceeding with the sale and purchase of the shares of the 9th respondent by the 11th respondent from the 10th respondent. The said injunction also appointed four new directors named therein to carry out the functions and duties of the board of directors and of the 11th respondent until after the trial of the action. The former directors and officers of the company were directed to hand over forthwith all correspondence, books of accounts and other relevant documents belonging to the 11th respondent to the four new directors who were required to prepare and lodge with the Senior Assistant Registrar monthly reports of and concerning the affairs of the 11th respondent. The respondents or any of them were at liberty to apply to set aside or vary the court order upon summons *inter partes* served on the appellant or its solicitors not later than fourteen clear days from the return date of such *inter partes* summons. The respondents accordingly applied to have the injunction set aside but an early date could not be fixed for the hearing. On November 22, 1986, two days after the interim injunction, the respondent obtained an *ex parte* order before Zakaria Yatim J. in chambers restraining the appellant whether by itself or its servants or agents from entering the premises of the 11th respondent until the trial of the action or until the disposal of the application to set aside the order dated November 20, 1986. As an early date could not be fixed for the hearing to set aside the order, the respondents applied by summons in chambers to have the effect of the orders stayed pending the hearing of the application to set it aside. Zakaria Yatim J. heard the application but fell ill in the course of the hearing. V.C George J. then took over and heard the application. The learned judge made an order suspending the effect of all the orders made on November 20, 1986, except for the first part which restrained the 11th respondent, whether by itself or by its servants or agents, from completing, implementing or proceeding with the sale and purchase of the shares of the 9th respondent from the 10th respondent until after the trial of the action. The appellants appealed.

Held: (1) an application for an injunction under Order 29 rule 1(1) R.H.C. 1980 has to be heard *inter partes*, thus enabling either the plaintiff or the defendant to apply. On the other hand, an *ex parte* application under sub-rule (2) may be made by the plaintiff only and in a case of urgency;